84-69

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

NO. _____

FERRIS E. TRAYLOR AND MARY V. TRAYLOR,

PETITIONERS

v.

L. B. SMITH, INC., RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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July 12, 1984

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QUESTIONS PRESENTED

1. Whether a party can be held responsible and made to suffer irreparable damage such as the imposition of a substantial default judgment, due solely to the gross neglect of counsel.

2. Whether Fed. R. Civ. P. 60(b)(6) relief is available to a party upon whom has been imposed a substantial default judgment in absence of notice and hearing, and due solely to the gross neglect of counsel, which issue has not been uniformly ruled on by the various circuits.

3. Whether due process and/or a litigant's right to notice and hearing requires a court, its officers, or opposing counsel to insure that a party is notified directly of a possible entry of judgment and other procedural matters, when the party's counsel is totally unresponsive, and is known to be totally unresponsive, and, in fact, the party's counsel is suspended from the practice of law when such judgment is entered.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Attorney Daniel M. Mills, on behalf of his clients Ferris E. Traylor and Mary V. Traylor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra App. 1) is unpublished. The opinions of the District Court (App. B & C, infra App. p. 14-18) are not reported.

JURISDICTION

The judgment of the Court of Appeals (App. A. infra App. p.1) was entered on March 2, 1984. A petition for rehearing was denied on April 17, 1984 (App. D, infra App. p.19). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. The Fourteenth Amendment to the U.S. Constitution provides in relevant part:

Section 1. * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *.

3. Fed. R. Civ. P. 55: Default.

(a) ENTRY. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) JUDGMENT. Judgment by default may be entered as follows:

(1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by

computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) SETTING ASIDE DEFAULT. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) PLAINTIFFS, COUNTERCLAIMANTS, CROSS-CLAIMANTS. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-

claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) JUDGMENT AGAINST THE UNITED STATES. No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

4. Fed. R. Civ. P. 60: Relief from Judgment or Order.

(a) CLERICAL MISTAKES. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is

no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT

This petition for a writ of certiorari is of exceptional importance because the United States Court of Appeals for the Seventh Circuit, in affirming the decision of the District Court in this matter, has effectively determined that a party is responsible and will be held accountable for the gross neglect of his counsel. Such a holding is contrary to the philosophy of modern federal procedure which stresses the

abandonment or relaxation of restrictive rules which prevent the hearing of cases on their merits. Jackson v. Beech, 636 F.2d 831 (D. C. Cir. 1980). The interest of ruling on the merits outweighs the interest in orderly procedure and the finality of judgments. Smith v. Jackson Tool & Dye, Inc., 426 F.2d 5 (5th Cir. 1970).

The appellants are seeking relief from a substantial default judgment under Fed. R. Civ. P. 60(b)(6), which provides that upon motion, a court may relieve a party or his legal representative from a final judgment, order or proceeding for . . . any other reason justifying relief from the operation of the judgment.

The general philosophy of Rule 60(b) was set out Inryco, Inc. v. Metropolitan Engineering Co., Inc, 708 F. 2d 1225, cert. denied, ___ U.S. ___ 1045 S. Ct. 347 (1983), at 1229-1230 (7th Cir. 1983), as "(t)he philosophy of modern federal procedure favors trials on the merits, and default judgments

should generally be set aside where the moving party acts with reasonable promptness, alleges a meritorious defense to the actions and where the default has not been willful." Inryco, at 1230 (quoting A. F. Dormeyer Co. v. M. J. Sales and Dist. Co., 461 F.2d 40,43 (7th Cir. 1972)). As the Inryco Court pointed out, this rule is reserved for extraordinary relief. A litigant therefore must show exceptional circumstances to justify overturning the default judgment. Inryco, at 1230 (quoting United States v. Forty-Eight Thousand, Five Hundred Ninety-Five Dollars, 705 F.2d 909 at 912 (7th Cir. 1983)); Planet Corporation v. Sullivan, 702 F.2d 123,125 (7th Cir. 1983). Exceptional circumstances exist in this case that justify setting aside the default judgment entered against these petitioners by the District Court.

Plaintiff-appellee L. B. Smith, Inc. filed its complaint against defendants-appellants Mr. and Mrs. Ferris E. Traylor on October 5, 1979, alleging that Mr. and Mrs.

Traylor were liable on a continuing guaranty of Lemmons & Company, Inc., which company defaulted on a conditional sales and rental contract with Smith. The contract between Smith and Lemmons was sold by Smith with recourse to First Maryland LeaseCorp. on the same day Mr. Traylor executed a continuing guaranty to First Maryland LeaseCorp. and First National Bank of Maryland guaranteeing the debts of Lemmons to those institutions. First Maryland LeaseCorp. later assigned the conditional sales contract to Smith, who assigned it to numerous financial institutions, said contract being eventually reassigned to Smith. The guaranty in favor of First Maryland and First Maryland LeaseCorp. was never assigned.

On October 12, 1979, Mr. and Mrs. Traylor were served with the complaint by certified mail at their residence in Key Biscayne, Florida. Upon receipt of service, Mr. and Mrs. Traylor promptly retained Francis J. Murtha, Jr., an Illinois attorney,

to represent them. Mr. Murtha had represented the Traylors on several legal matters in the past.

On December 21, 1979, plaintiff filed its motion for default, alleging defendants' failure to appear, and on March 12, 1980, the clerk entered a default. On May 20, 1980, Francis J. Murtha, Jr., filed his appearance for defendants.

Certain various pre-trial and trial dates were set during the remainder of 1980 through September 10, 1981. On June 29, 1981, plaintiff's counsel, by letter referring to an ex parte conversation, requested the Judge rule on the motion for default judgment that had been filed January 5, 1981. On August 19, 1981 the Judge entered judgment for Smith. Only Smith's counsel was listed on this judgment entry for purposes of distribution.

Throughout this period, Samuel A. Fuller, counsel for Smith, had not been able to reach Francis J. Murtha, Jr. on this

matter despire numerous attempts. In fact, other than Mr. Murtha's entering an appearance, he had taken no other action and had not moved to set aside the default entry. He had not responded to letters or telephone messages from Mr. Fuller.

During the same time, Mr. and Mrs. Traylor were in contact with Mr. Murtha, and he continually assured them that all was proceeding satisfactorily with the case. He never advised them of the true and correct status of the case, and continually represented to them that the litigation was being properly handled, that he was defending their interests, and that there was no danger of Smith's obtaining a judgment against them.

It was not until September 17, 1982, when Mr. and Mrs. Traylor received subpoenas for their depositions, that they knew that an adverse judgment had been entered against them. Upon receipt of these subpoenas, Mr. and Mrs. Traylor immediately engaged counsel, their present attorney Daniel M. Mills, who,

on October 15, 1982, moved the court to set aside the default entry of March 12, 1980 and the default judgment of August 19, 1981, which motions were denied by the District Court on January 31, 1983.

Mr. and Mrs. Traylor filed their Notice on Appeal of February 24, 1983. The judgment of the District Court was subsequently affirmed by the U. S. Court of Appeals for the Seventh Circuit on March 2, 1984. The oral argument before the Court of Appeals was the first and only time the Traylors had legal representation of their interests in this matter at a hearing.

The memorandum entry of the District Court dated January 31, 1983, attached hereto as Appendix C, states that defendants' motion to set aside the judgment was denied because of their inordinate delay and dilatory tactics, with the record not constituting the compelling and extraordinary circumstances necessary to grant defendants' motions pursuant to Rules 62(b), 55(c) and

60(b) of the Federal Rules of Civil Procedure. However, Mr. and Mrs. Traylor have demonstrated that Mr. Murtha contrived even after the entry of default to misrepresent the status of this litigation to his clients, and that they received no notice of a default judgment against them until they were served with subpoenas in September 1982. The period of time prior to seeking relief from the judgment cannot be segregated from the conduct of Murtha which the District Court itself suggested is sufficient to grant Mr. and Mrs. Traylor Rule 60(b)(6) relief.

REASONS FOR GRANTING THE PETITION

A. Due Process of Law was Denied Mr. and Mrs. Traylor in the District Court Proceedings.

Rule 55(b) of the Federal Rules of Civil Procedure states that if a party has appeared in an action, he shall be served with written notice of an application for default judgment at least 3 days prior to the hearing on such application. Mr. and Mrs. Traylor were denied due process of law because they never

received notice of any kind of the application for judgment filed by Smith. The Court records do not indicate that such written notice was issued to Mr. Murtha or to the Traylors, nor that a hearing was scheduled or held on Smith's application for judgment. Because of the absence of notice of hearing and the failure of the District Court to conduct a hearing concerning Smith's application for default judgment, the Traylors' rights to due process, to notice and a hearing, were denied.

Rule 55(c) of the Federal Rules of Civil Procedure provides that a default judgment may be set aside in accordance with Rule 60(b), including Rule 60(b)(4): "the judgment is void." The U. S. Court of Appeals for the Seventh Circuit stated in A. F. Dormeyer Co. v. M. J. Sales and Dist. Co., 461 F.2d 40(7th Cir. 1972) that non-compliance with the notice provision of Rule 55(b)(2) makes a judgment voidable. Mr. and Mrs. Traylor never had notice of the application for

default. Absence of the required notice under Rule 55(b)(2) can justify reversal of the trial court for failure to set aside a default judgment. Wilson v. Moore and Associates, Inc., 564 F. 2d 366 (9th Cir. 1977); Turner v. Salvatierra, 580 F. 2d 199 (5th Cir. 1978); Charlton L. Davis & Co., P. C. v. Fedder Data Center, 556 F. 2d 308 (5th Cir. 1977).

The U. S. Court of Appeals for the Seventh Circuit discussed the case of Sonus Corp. v. Matsushita Electric Industrial Co., LTD. 61 F.R.D. 644 (D.C. Mass. 1974) in Note 2 of Planet Corporation v. Sullivan, 702 F.2d 123 (7th Cir. 1983), and stated that while the general rule is that a default entered without written notice is voidable rather than void, where there is not only no written notice but also no actual notice, the judgment is void for want of due process. Mr. and Mrs. Traylor had no written notice and no actual notice of the application for default judgment and therefore, the default

judgment must be declared void and without due process of law. Bass v. Hoagland, 172 F. 2d 205 (5th Cir. 1949), cert. denied, 338 U.S. 816 (1949). In Bass, the U.S. Court of Appeals for the Fifth Circuit, in declaring the default judgment void and without due process, said the absence of the counsel did not make the notice unnecessary, but made it servable on defendant instead of his counsel. The Court of Appeals itself recognizes this principle, when, in its March 2, 1984 order, it stated " . . . (i)f there is any question (emphasis added) about whether an attorney continues to represent the defaulting party, it would be advisable to require notice directly to the party as well as to the attorney." No distinction can be made in this case, where Mr. and Mrs. Traylor's counsel was completely unresponsive, and that fact was known to opposing counsel who did not inform the Court that he had been unable to reach Murtha for over a year. Furthermore, Mr. Murtha was actually suspended from the

practice of law when the default judgment in this case was entered.

The March 2, 1984 Order of the Court of Appeals indicates that the notice required by this Rule has been described as "procedural" rather than "constitutional," citing Yale v. National Indemnity Co., 602 F.2d 642, 650 (4th Cir. 1979). The Court says that the default judgment obtained in such instance of lack of notice is voidable, not void, and that attendant circumstances (emphasis added) must be considered to determine the magnitude of the error. Planet Corporation v. Sullivan, 702 F.2d 123,125-26, n.2 (7th Cir. 1983). Attendant circumstances are crucial in this fact sensitive case. Because of the gross misrepresentations of Murtha, this traditionally procedural protection became more constitutional in nature because it was the only due process protection the Traylors had.

B. Damages Cannot be Calculated.

It was error for the District Court to

have granted a default judgment for money damages without a hearing. Eisler v. Stritzler, 535 F. 2d 148 (1st Cir. 1976), cert. denied. 429 U.S. 895 (1976); David v. National Mortgage Co., 320 F. 2d 90 (2d Cir. 1963). The Smith complaint sought damages in the amount of $825,000.00. The motion for default judgment asked for damages of $251,324.95, and referred to attached affidavits, which affidavits were not attached. The judgment entry of August, 1981 granted damages of $245,824.95. It is impossible to know how the award was calculated.

In Eisler, supra, the Court of Appeals found that "although the default judgment was proper, it would not have been correct to assess damages without a hearing. Since plaintiffs' claims were not for unliquidated damages and defendant had made an appearance, a hearing, although not a jury trial . . . was required . . ." Eisler at 153. This case is directly applicable to the Traylors'

situation. Plaintiff Smith's claims were not for liquidated damages, and Mr. Murtha had made an appearance. Hence, a hearing on the issue of damages was clearly required.

The District Court could not grant a default judgment without a hearing where damages were unliquidated. United Artist Corp. v. Freeman, 605 F. 2d 854 (5th Cir. 1979). A court must hold a hearing on damages before entering a judgment on an unliquidated claim even against a defendant who has been totally unresponsive. Jackson v. Beech, 636 F. 2d 831 (D. C. Cir. 1980). The substantial reduction of the award below the damages claimed under plaintiff's complaint indicates at the very least that mitigating circumstances exist. Barber v. Turberville, 218 F.2d 34 (D.C. Cir. 1954).

Without affidavits or evidence of any kind, damages, which were not subject to mathmatical calculation, could not have been calculated by the District Court. The entire record is iregular in nature, in violation of

Rule 55(b)(2), and in violation of due process of law. To allow the judgment to stand deprives Mr. and Mrs. Traylor of their property without due process of law and is therefore unconstitutional under the Fifth and Fourteenth Amendments.

C. Mr. and Mrs. Traylor Were Effectively Without Counsel in the District Court.

Murtha's behavior represents gross, inexcusable neglect, and is the type of extraordinary event which must be remedied by Rule 60(b)(6) of the Federal Rules of Civil Procedure. This rule provides for extraordinary relief and may be invoked only upon a showing of exceptional circumstances. Ben Sager Chemicals International, Inc. v. E. Targosz and Co., 560 F.2d 805 (7th Cir. 1977), citing DiVito v. Fidelity and Deposit Co. of Maryland, 361 F.2d 936 (7th Cir. 1966). This court said in Ben Sager Chemicals, that the leading case supporting relief under Rule 60(b)(6) for gross negligence of counsel is L.P. Steuart, Inc.

v. Matthews, 329 F.2d 234 (D.C. Cir. 1964) cert. denied, 379 U.S. 824 (1964). Murtha's conduct is like that of the counsel in L.P. Steuart, who failed to prosecute his client's complaint, causing its dismissal. Like Murtha, that counsel assured his client that his interests were being properly represented. L.P. Steuart at 235.

While the District Court in this case suggests that Murtha's conduct is sufficient to grant Mr. and Mrs. Traylor Rule 60(b)(6) relief, concern over the ten-month period from the date the District Court determined Mr. Traylor knew about the default judgment to October 15, 1982, when Mr. and Mrs. Traylor sought Rule 60(b) relief, caused the District Court to decide that Mr. and Mrs. Traylor were dilatory. Certainly the two month difference between the time Matthews acted in L.P. Steuart, and the time Mr. Traylor acted in this case cannot be the difference between lack of neglect on the

part of Matthews, L.P.Steuart at 235, and neglect on the part of Mr. Traylor.

It is doubtful that Mr. Traylor knew of the existence and effect of the default judgment in December, 1981 as the District Court speculated. Mr. Traylor understood that creditors, including Smith, of Lemmons & Company, Inc., of which he is a shareholder, were being properly handled in the reorganization proceedings of Lemmons, and that certain judgments of creditors were satisfied on August 20, 1981 by the distribution of two million dollars to certain creditors and judgment holders of Lemmons and Mr. and Mrs. Traylor. He did not know the true status of the case until on or about September 17, 1982 when he was served with a notice for his deposition. Mr. Traylor sought Rule 60(b) relief and Rule 55(c) relief on October 15, 1982, less than one month after he knew of the existence and effect of the default judgment. Certainly this prompt action upon actual notice does

not constitute inordinate delay or dilatory tactics.

D. What Delay Entitles A Party to Fed. R. Civ. P. 60(b)(6) Relief Has Not Been Uniformly Ruled on by the Circuits.

Relief under Rule 60(b)(6) should be granted where, because a party did not know of the existence of an adverse order, the passage of time precluded the party from relying on a good defense under Rule 60(b)(1) for mistake, inadvertence, or surprise, as in the case of Mr. and Mrs. Traylor. Cavalliotis v. Salomon, 357 F.2d 157 (2d Cir. 1966); Radack v. Norwegian American Lines Agency, Inc., 318 F.2d 538 (2d Cir. 1963). The court in Cavalliotis said 18 months is not necessarily an unreasonable delay, and noted that adverse decisions and judgments were relieved in Klapprott v. United States, 335 U.S. 601 (1949), modified, 336 U.S. 942 (1949), where over four years had passed; in Radack, where 15 months had passed; and in Pierre v. Bernuth, Lembeck Co., 20 F.R.D. 116 (S.D.N.Y. 1956) where over three years

passed. Cavalliotis, at 159. It is clear from these cases that there is a split of authority among the circuits as to when and in what circumstances a delay is excusable in granting Rule 60(b)(6) relief, which is another compelling justification for this Court to rule on the issues presented by this petition for certiorari.

When the rule of Medunic v. Lederer, 533 F.2d 891 (3d Cir. 1976) is applied to this case, there is no question that the District Court abused its discretion and must be reversed. Medunic, at 893, held that a motion to set aside a default judgment cannot be denied without determining whether prejudice would accrue to the plaintiff if the motion were granted, and whether a meritorious defense has been presented in support of the motion to set aside. Mr. and Mrs. Traylor have, as set forth in paragraph D herein, meritorious defenses and absolutely no prejudice would result to Smith in setting aside the default judgment. Smith has relied

upon nothing except Murtha's gross neglect and the existing procedural defects in obtaining the default judgment. Smith waited with knowing silence more than 13 months to execute on its default judgment, in order to take from the Traylors relief under Rule 60(b)(6)(1) for surprise. Smith will suffer no prejudice in the setting aside of the default judgment and entry of default.

Surely the fact that Murtha consistently lied to Mr. and Mrs. Traylor about the status of the proceedings is sufficient to obtain Rule 60(b)(6) relief in and of itself. Parties should not suffer irreparable harm due to the actions of their attorneys. Jackson v Beech, 636 F.2d 831 (D.C. Cir. 1980). When defendants are not personally negligent in the protection of their interests, courts have been reluctant to attribute to the parties the errors of their legal representatives. A. F. Dormeyer Co. v. M. J. Sales and Dist. Co., 461 F.2d at 42-43, citing Barber v. Turberville, 218 F.2d 34;

Patapoff v. Vollstedt's, Inc., 267 F.2d 863 (9th Cir. 1959).

D. Mr. & Mrs. Traylor Have Presented a Meritorious Defense to the Smith Complaint.

An understanding of the meritorious defenses of Mr. and Mrs. Traylor requires an analysis of the Smith complaint. Both counts of Smith's complaint are based on an alleged sales and rental contract between Smith and Lemmons & Company, Inc. Mr. and Mrs. Traylor were not personally obligated as makers on this contract. Both counts refer to Exhibit 2 which is a copy of a guaranty of Lemmons & Company, Inc.'s debt to First National Bank of Maryland and First Maryland LeaseCorp., allegedly signed by Mr. and Mrs. Traylor. The exhibits show that the Count I contract was assigned to First Maryland Lease Corp. on June 16, 1976, the same date the contract was signed. On August 30, 1979 after numerous assignments, the contract was reassigned to Smith.

The guaranty which is Exhibit 2 of the complaint was never assigned. By its terms, it guarantees nothing except debts owing to First National Bank of Maryland and First Maryland LeaseCorp. The guaranty was signed by Mr. Traylor, but not by Mrs. Traylor.

Nowhere do Mr. and Mrs. Traylor guarantee any indebtedness of Lemmons & Company, Inc. to Smith. Although the contract referred to in Count I was assigned from and eventually back to Smith, nothing in the record indicates the assignment to Smith of the guaranty.

In any case, it does not logically follow that the promisee under the guaranty would in all cases be willing to assign the guaranty along with the Lemmons contract and underlying obligation. There is no factual basis in the record to hold Mr. and Mrs. Traylor liable to Smith for any amount that may be due under the contract to Smith. Mr. & Mrs. Traylor therefore have a good and legitimate defense in that the Smith

complaint does not state a cause of action against them.

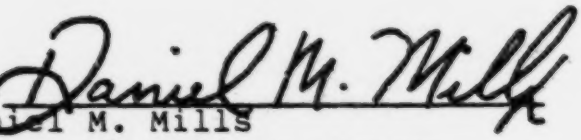
Lemmons & Company, Inc., promissor under the contract, must be credited with at minimum the fair market value of the equipment, which Smith has allegedly repossessed. If Smith took the equipment back and decided to keep it, then their contract debt should be considered satisfied. This would be an accord and satisfaction, or at the very least, mitigation of damages.

In any case, Smith would have had to dispose of the equipment in a reasonable commercial manner. Failure to do so would be a defense for Mr. and Mrs. Traylor. By taking equipment back, Smith may have released Lemmons & Company, Inc. which would result in the release of Mr. and Mrs. Traylor.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and unpublished order of the Seventh Circuit.

Respectfully submitted,



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Dated: July 12, 1984

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

(ARGUED: NOVEMBER 15, 1983)*

March 2, 1984

Before

Hon. Wilbur F. Pell, Jr. Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. J. Sam Perry, Senior District Judge*

L. B. SMITH, INC., Plaintiff-Appellee,	)	Appeal from the United States
vs.	)	District Court,
No. 83-1369	)	Southern District
	)	of Indiana,
FERRIS E. TRAYLOR & MARY V. TRAYLOR,	)	Indianapolis Division.
	)	
Defendants-Appellants.	)	No. IP 79-821-C James E. Noland, Judge

O R D E R

Defendants appeal from an order of the district court denying their motion, pursuant to Fed. R. Civ. P. Rule 60(b)(6), to set aside entry of a default and a default judgment. They also appeal from the court's actions in denying their related motion for a stay of execution of the judgment and

granting plaintiff's motion for a protective order. For the reasons stated below, the judgment of the district court is affirmed.

I.

On October 5, 1979, plaintiff commenced action against defendants in their capacity as guarantors for debts owned by Lemmons & Co., Inc., a company which subsequently filed for bankruptcy. Lemmons & Co., Inc. had purchased and rented equipment from plaintiff. The complaint was served on the defendants at their residence in Florida, and they contacted Francis Murtha, Jr. an Illinois attorney, to represent them in the matter. It appears that the defendants remained in Florida for the entire time period in question.

Murtha took no action, and, on December 21, 1979, plaintiffs filed a motion for default. The clerk of the court entered a default on March 12, 1980; notice of this default may have been sent to the defendants and did reach Murtha. He wrote to

plaintiff's counsel on March 26, acknowledging receipt of the entry of default and requesting a copy of the complaint. On May 20, 1980, Murtha filed his appearance for the defendants. At this point, proceedings in the case went forward on two different levels. The court sent notices to both attorneys, setting and altering dates for trial and for pre-trial conferences. At the same time, Samuel Fuller, plaintiff's counsel, filed a motion for default judgment and later requested that the court rule on that motion. The judgment entry was signed on August 19, 1981, and there were no further notices regarding trial dates. During this time Murtha took no action, and defendants say they had no knowledge of the status of the case but were continually assured by Murtha that everything was proceeding satisfactorily.[1/]

In early December 1981, Fuller contacted the defendants' son to inquire about reaching his parents. The following day the defendants

contacted Dan Mills, the attorney who now represents them, and asked him to look into the matter. Mills conferred with Fuller and informed defendants that there was a judgment against them and that Murtha had taken no action other than filing a belated appearance. The defendants did not retain Mills to represent them at this time and, in fact, took no legal steps. Defendants claim that they contacted a representative of the plaintiff to discuss the matter and developed an informal agreement that plaintiffs would not take steps to enforce the judgment if defendants would cooperate in providing materials for a future purchase. Plaintiffs deny this conversation, and there is no offer of documentary proof or other evidence.

In September 1982, defendants were served with subpoenas in an action to collect on the judgment. Defendants promptly retained Mills' services and soon thereafter filed the motions to set aside entry of the default and default judgment and to stay execution of the

judgment. They also filed a notice to depose an official of the Attorney Registration and Disciplinary Commission to obtain testimony regarding Murtha's status as a licensed attorney; this motion was countered by plaintiff's motion for a protective order.

The central question before us is whether the district court's denial of the motion to set aside the judgment was in fact proper. If it was, the court's rulings on the other motion are well founded. There would be no merit in staying the execution of a valid judgment or in obtaining further testimony in the matter. Defendants base their challenge to denial of the motion to set aside on two grounds: 1) that procedural defects in obtaining the judgment violated their due process rights,[2/] and 2) that failure to provide relief under Rule 60(b)(6) was an abuse of discretion. Either ground, if proved, would warrant reveral. Textile

Banking Company, Inc. v. Rentschler, 657 F.2d 844, 850 (7th Cir. 1981).

II.

The facts of this case do not indicate due process violations that would render the judgment void. Defendants claim that they did not receive written notice three days prior to the court's consideration of the motion for default judgment; such notice is required by F.R.P.C. Rule 55(b)(2) when the defaulting party has appeared in the action. It is not clear that Murtha's notice of appearance, which was filed after the entry of default but before the judgment, would operate to invoke this section. See generally, 10 Wright, Miller & Kane, Federal Practice and Procedure § 2686 (1983). However, we will assume arguendo that it is a sufficient appearance in this instance, in view of the underlying purpose of the rule. Id. at §2687; H. F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 432 F.2d

689, 691 (D.C. Cir. 1970). Although failure to provide this notice when required raises questions of due process and can lead to a finding that the judgment is void, such failure does not automatically invalidate a judgment. Rutland Transit Co. v. Chicago Tunnel Terminal Co., 233 F.2d 655,658-59 (7th Cir. 1956); 10 Wright, Miller & Kane, supra. The notice required by Rule 55(b)(2) has been described as "procedural," rather than "constitutional," Yale v. National Indemnity Co., 602 F.2d 642, 650 (4th Cir. 1979), and federal courts have treated lack of this written notice as an irregularity rather than as a fatal flaw. Id, n.17. The default judgment obtained is voidable, not void, and the attendant circumstances must be considered to determine the magnitude of the error. Planet Corp. v. Sullivan, 702 F.2d 123,125-26, n.2 (7th Cir. 1983).

In the instant case, there is no indication or reason to believe that the defendants or their counsel would have

responded in any different manner or would have become active litigants if the notice had been received. Defendants' attorney was not responding to the entry of default or to various notices from the court setting dates for conferences and for trial. There is no reason to believe that he would have responded to the three-day notice. In view of the pattern of inattention by the attorney and the defendants themselves, failure to provide prior notice does not invalidate this judgment. See, H. F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 432 F.2d at 692; Rutland Transit Co. v. Chicago Tunnel Terminal Co., 233 F.2d at 659. This is not intended to imply that failure to provide such notice should be viewed lightly, and the court should take steps to assure that the notice has in fact been given. If there is any question about whether an attorney continues to represent the defaulting party, it would be advisable to

require notice directly to the party as well as to the attorney.

Defendants also cite the absence of a hearing on the application for default judgment and the absence of a hearing to determine damages. Rule 55 states that the court "may" conduct hearings to determine the amount of damages or the truth of any averment, but there is no absolute requirement for a hearing. Fed. R. Civ. P. 55(b)(2); 10 Wright, Miller, & Kane, supra, at § 2688. A hearing is required only when it is necessary to determine the amount of damages. United States v. DeFrante, 708 F.2d 310, 312 (7th Cir. 1983). Here, the purchase and rental agreements and the financial calculations contained in the record provide satisfactory documentation of the amount of damages. The court's failure to provide a hearing on the issue of default or the issue of damages was not error in this case.

III.

The district court's denial of relief under Rule 60(b)(6) was not an abuse of its discretion. To obtain such relief the applicant must show that 1) there was good cause for the default, 2) swift action was taken to correct the default, and 3) the defaulting party has meritorious defenses in the underlying action. In re: Busick, 719 F.2d 922,925 (7th Cir. 1983); Breuer Electric Manufacturing Co. v. Toronado Systems of America, Inc., 687 F.2d 182, 195 (7th Cir. 1982). Even if we were to concede without discussion the defendants' claim that they have meritorious defenses, this court has not ruled on the question of whether gross negligence on the part of an attorney can entitle a party to relief under Rule 60(b)(6). Inryco, Inc. v. Metropolitan Engineering Co., Inc., 708 F.2d 1225, 1233 (7th Cir. 1983), cert. denied, ___ U.S. ___, 104 S. Ct. 347 (1983). However, in the case before us, the requirements that there be

swift action after learning of the default is sufficient to preclude relief. The defendants acknowledge that they learned of the default judgment in December 1981, yet they took no action until the following September. They were in communication with a non-negligent attorney at that time and could have learned, if they did not know already, of the effect of such a judgment. The affidavit of one of the defendants indicates that he has a full understanding of what such a judgment means. The only reason given for the delay is a vague and unsupported account of an "understanding" with an unnamed representative of the plaintiff. This account is denied in a verified affidavit of the only representative who spoke with the defendant during this time period. Even if an agreement regarding enforcement of the judgment were documented, it would not necessarily excuse failure to take legal steps to remove the judgment. The district court's ruling was based on the "inordinate

delay of the defendants in moving to rectify the situation" and we do not find the ruling or its basis, to be an abuse of discretion. The defendants have not exhibited the diligent, conscientious efforts required for Rule 60(b)(6) relief in this type of situation. Id. at 1234; Ben Sager Chemicals International, Inc. v. E. Targosa & Co., 560 F.2d 805, 810 11 (7th Cir. 1977).

AFFIRMED

Footnotes

*Senior District Judge J. Sam Perry, Northern District of Illinois, sitting by designation. Judge Perry heard oral argument and participated in the conference, but passed away before acting on this order.

Footnotes Cont.

1/ Murtha was suspended from the practice of law by the Illinois Supreme Court from June 26, 1981 until November 3, 1981. This includes the date on which the judgment was entered. However, there is no indication in the record that either the parties, plaintiff's attorney, or the court were aware of this fact at the time. On April 15, 1982 Murtha was again suspended from the practice of law for a period of two years. The suspensions were for matters unrelated to this case.

2/ If the judgment were obtained in a manner which violated due process of law it would be void. Textile Banking Company, Inc. v. Rentschler, 657 F.2d 844 (7th Cir. 1981). In that event, relief would be available under Fed. R. Civ. P. Rule 60(b)(4), rather than Rule 60(b)(6). Planet Corp. v. Sullivan, 702 F.2d 123,125 (7th Cir. 1983).

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

L. B. SMITH, INC., Plaintiff	)	
vs.	)	IP 79-821-C
FERRIS E. TRAYLOR and MARY V. TRAYLOR, Defendants	)	

JUDGMENT ENTRY

Comes now the Plaintiff, by counsel, and files its Motion for Judgment which motion is in the words and figures following to-wit:

(H.I.)

And the Court being duly advised in the premises now grants same.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff have and recover of and from the Defendants the sum of Two Hundred Twenty-Eight Thousand Six Hundred Forty-Six and 95/100 Dollars ($228,646.95) on Count I of Plaintiff's Complaint.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff have and recover of and from the Defendants the sum of Seventeen Thousand One Hundred Seventy-Eight and 00/100 Dollars ($17,178.00) on Count II of the Plaintiff's Complaint.

Costs versus Defendants.

/s/ James E. Noland
JUDGE, United States District Court Southern District of Indiana

Dated: August 19, 1981

Samuel A. Fuller
Stewart Irwin Gilliom Fuller & Meyer
300 Merchants Bank Building
Indianapolis, Indiana 46204
639-5454

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

L. B. SMITH, INC.	)	
	)	CAUSE NO.
vs.	)	IP 79821C
	)	
FERRIS E. TRAYLOR and MARY V. TRAYLOR,	)	

O R D E R

This cause is before the Court on defendants' motions to stay and to set aside a default judgment pursuant to Rules 62(b), 55(c) and 60(b), Federal Rules of Civil Procedure.

Whereupon the Court, having examined the motions and memoranda, hereby DENIES defendants' motions.

IT IS SO ORDERED.

DATED this 31st day of January, 1982.

/s/ James E. Noland
James E. Noland, U.S. District Judge

MEMORANDUM ENTRY

Since defendants' motion comes more than one year after entry of judgment, relief must be sought pursuant to Rule 60(b)(6), Federal Rules of Civil Procedure. Bershad v. McDonough, 469 F.2d 1333 (7th Cir. 1972).

Relief under Rule 60(b)(6) is discretionary. Consolidated Machinery and Fireproofing, Inc. v. Wagman Const. Corp., 383 F.2d 249 (4th Cir. 1967). It is available when extraordinary circumstances are demonstrated by compelling facts. Divito v. Fidelity and Deposit Company, 361 F.2d 936 (7th Cir. 1966); Wright and Miller, Federal Practice and Procedure § § 2857, 2869. Motions for Rule 60(b)(6) relief must be brought within a "reasonable time." Wright and Miller §2866 at 228-229.

Default judgment was entered on August 19, 1981; Mr. Traylor became aware of it in December, 1981 (Affidavit of F. E. Traylor at 3). Ten months thereafter — on October 15, 1982 — defendants moved to set the judgment aside.

While the behavior of defense counsel was indeed irregular and might, without more, be sufficient to grant defendants' motions, the inordinate delay of defendants in moving to rectify the situation creates substantial doubt about the bona fides of their present action. To await plaintiff's enforcement attempts before challenging an allegedly baseless judgement—one obtained as a result of purportedly inept and/or nonexistent counsel—suggests more concern for delay than for an expeditious hearing on the merits. This Court cannot abide such dilatory tactics, and such record does not constitute the compelling and extraordinary circumstances necessary to grant defendants' motions.

CERTIFIED: A TRUE COPY
JAMES R. TYRE, ACTING CLERK
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

By /s/ Jerry Hensley
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

April 17, 1984

Before

Hon. Wilbur F. Pell, Jr. Circuit Judge

Hon. Richard D. Cudahy, Circuit Judge
Hon. J. Sam Perry, Senior District Judge*

L. B. SMITH, INC.,	)	
Plaintiff-Appellee,	)	Appeal from the
	)	United States
vs.	)	District Court,
No. 83-1369	)	Southern District
	)	of Indiana,
FERRIS E. TRAYLOR &	)	Indianapolis
MARY V. TRAYLOR,	)	Division.
	)	
Defendants-Appellants.	)	No. IP 79-821-C
	)	James E. Noland, Judge

O R D E R

In consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by the appellants, no judge in active service has requested a vote thereon, and a majority of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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*Senior District Judge J. Sam Perry, Northern District of Illinois, sitting by designation. Judge Perry heard oral argument and participated in the conference, but passed away before acting on this order.